

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

BRICADE TALMUS SLEDGE,

Defendant-Appellant.

UNPUBLISHED

January 25, 2005

No. 249894

Wayne Circuit Court

LC No. 03-002179-01

Before: Gage, P.J., and Meter and Hood, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial convictions for three counts of felonious assault, MCL 750.82, two counts of armed robbery, MCL 750.529, first-degree home invasion, MCL 750.110a, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. Defendant was sentenced to two to four years' imprisonment for the felonious assault convictions, twenty to seventy years' imprisonment for the armed robbery convictions, ten to twenty years' imprisonment for the home invasion conviction and two years' imprisonment for the felony-firearm conviction. The offenses involved the assaults upon several people in a gambling house. We affirm.

On appeal, defendant challenges the sufficiency of the evidence to support one of his armed robbery convictions and also argues that the prosecutor's remarks during rebuttal argument denigrated his defense, denying him a fair trial. We disagree.

First, this Court addresses defendant's challenge to the sufficiency of the evidence to support his armed robbery conviction. By its nature, a claim of insufficient evidence to sustain a criminal conviction invokes the constitutional right to due process of law. *People v Hawkins*, 245 Mich App 439, 457; 628 NW2d 105 (2001). "Thus, review is de novo for this constitutional issue." *Id.* "[W]hen determining whether sufficient evidence has been presented to sustain a conviction, a court must view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt." *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999) (internal citations and quotation omitted).

"The elements necessary to prove an armed robbery are: (1) an assault, (2) a felonious taking of property from the victim's presence or person, (3) while the defendant is armed with a

weapon described in the statute.” *People v Ford*, 262 Mich App 443, 458; 687 NW2d 119 (2004) (internal citations and quotations omitted).

A person who aids or abets the commission of a crime may be convicted and punished as if he directly committed the offense. MCL 767.39; *People v Turner*, 213 Mich App 558, 568; 540 NW2d 728 (1995)[, overruled in part on other grnds in *People v Mass*, 464 Mich 615, 627-628; 628 NW2d 540 (2001)]. “To support a finding that a defendant aided and abetted a crime, the prosecution must show that (1) the crime charged was committed by the defendant or some other person, (2) the defendant performed acts or gave encouragement that assisted the commission of the crime, and (3) the defendant intended the commission of the crime or had knowledge that the principal intended its commission at the time he gave aid and encouragement.” *Id.* at 568. [*People v Izarraras-Placante*, 246 Mich App 490, 495-496; 633 NW2d 18 (2001).]

Here, defendant argues that the prosecution never proved the second element of armed robbery with respect to the robbery of Freida Tiggs. Specifically, defendant argues that, because Tiggs did not look to see who took the money from her sock, the prosecution has not presented sufficient evidence that either defendant took the money or that one of defendant’s accomplices took the money with defendant’s aid or encouragement. We disagree.

Defendant does not challenge his other convictions in this case; therefore, it is established that defendant was one of the robbers that night. Given that defendant and two other men, all armed with guns, forced everyone in the room either to lie facedown on the floor or sit against the wall before they ordered Tiggs to strip and take off her socks, it is reasonable to infer that one of three robbers took the money from Tiggs’ socks. Viewed in the light most favorable to the prosecution, this evidence was sufficient for a rational jury to find beyond a reasonable doubt that defendant, or an accomplice acting with defendant’s aid or encouragement, took the money from Tiggs.

Next, this Court addresses defendant’s claim that the prosecutor’s statements denigrated his defense. This Court’s “[r]eview of alleged prosecutorial misconduct is precluded unless the defendant timely and specifically objects, except when an objection could not have cured the error, or a failure to review the issue would result in a miscarriage of justice.” *People v Callon*, 256 Mich App 312, 329; 662 NW2d 501 (2003). In this case, defendant did not object to the prosecutor’s statements during closing argument, and, therefore, failed to preserve this issue. “Because the alleged error was not preserved by a contemporaneous objection and a request for a curative instruction, appellate review is for plain (outcome-determinative) error.” *Id.*

To satisfy the plain error test first set forth in *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999), a defendant must show that

1) error . . . occurred, 2) the error was plain, i.e., clear or obvious, 3) and the plain error affected substantial rights. The third requirement generally requires a showing of prejudice, i.e., that the error affected the outcome of the lower court proceedings. In addition, defendant must show that the error resulted in the conviction of an actually innocent defendant or that the error seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings [*People v*

Kimble, 470 Mich 305, 312; 684 NW2d 669 (2004) (internal citations and quotations omitted).]

The first step under this test is to determine whether error occurred. A reviewing court must consider claims of prosecutorial misconduct on a case by case basis by examining the record and evaluating the remarks in context. *People v Schutte*, 240 Mich App 713, 721; 613 NW2d 370 (2000), abrogated in part on other grounds by *Crawford v Washington*, 541 US 36; 124 S Ct 1354; 158 L Ed 2d 177 (2004). “Prosecutorial comments must be read as a whole and evaluated in light of defense arguments and the relationship they bear to the evidence admitted at trial.” *Schutte*, *supra* at 721. A prosecutor may argue the evidence and all reasonable inferences arising from it as they relate to his theory of the case. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995). During closing argument, a prosecutor is free to attack the witnesses’ credibility in light of the evidence. *People v Howard*, 226 Mich App 528, 548; 575 NW2d 16 (1997). He may use emotional language. *People v Ackerman*, 257 Mich App 434, 454; 669 NW2d 818 (2003). However, “[a] prosecutor may not suggest that defense counsel is intentionally attempting to mislead the jury.” *People v Watson*, 245 Mich App 572, 592; 629 NW2d 411 (2001). Still, an “otherwise improper remark may not rise to an error requiring reversal when the prosecutor is responding to the defense counsel’s argument.” *Id.* at 593 (internal citation and quotation omitted).

In the present case, defendant challenges remarks made by the prosecutor during rebuttal argument. Defendant claims that the prosecutor denigrated his defense when he said, “this defense is really an effort to try to pull the wool over your eyes. . . . The defense that ‘B’ [defendant] and ‘E’ didn’t commit this crime because they weren’t there is a lie. It’s nothing more than a lie.”

The prosecutor’s remarks in the present case do not rise to the level of those in *People v Dalessandro*, 165 Mich App 569; 419 NW2d 609 (1988), which defendant cites as requiring a finding of prosecutorial misconduct here. In *Dalessandro*, the prosecutor implied that defense counsel was “disreputable” for placing a defense witness on the stand because the defense’s facts were “‘lies. They’re damnable lies. They’re demonstrable lies. They’re fabrications of evidence. That’s the way this whole thing has been run.’” *Id.* at 579. The *Dalessandro* Court held that the prosecutor’s argument suggested to the jury that defense counsel was intentionally trying to mislead the jury, “thus chastising defense counsel and defendant’s entire defense.” *Id.* at 580.

In the present case, the prosecutor was responding to defendant’s attacks on the credibility of the prosecution’s witnesses. During closing argument, defense counsel suggested that prosecution witnesses Tiggs, Andrea Carson, Patricia Carson, and Johnnie Williams colluded to fabricate testimony to implicate defendant in the robbery. Defense counsel also commented on the credibility of the defense witnesses and their lack of motivation to lie. In contrast, the prosecutor’s rebuttal focused on rehabilitating the prosecution witnesses’ credibility in response to the defense’s closing argument. The prosecutor’s statements during rebuttal that immediately preceded the statements now challenged by defendant all pertained to the lack of credibility of each of the defense witnesses, not defense counsel. When read as a whole, it becomes apparent that the prosecutor’s rebuttal was not commenting on the defense counsel’s character but on the credibility of the defense witnesses and on the credibility of defendant’s

alibi. In this context, the prosecutor's rebuttal remarks were not improper. *Howard, supra* at 548.

To the extent the remark could be deemed improper, "[n]o error requiring reversal will be found if the prejudicial effect of the prosecutor's comments could have been cured by a timely instruction." *Schutte, supra* at 721. Furthermore, defendant was not prejudiced because, "[a]bsent an objection, the judge's instruction that arguments of attorneys are not evidence dispel[s] any prejudice." *Id.* at 721-722 (internal citation and quotation omitted). The trial court instructed the jury that the lawyers' statements and arguments are not evidence, that the lawyers' arguments are only intended to help explain their legal theories, and that the jury is only to accept statements supported by the evidence and their own common sense. Therefore, defendant has not shown that the prosecutor's comments warrant a reversal of his convictions or a new trial.

Affirmed.

/s/ Hilda R. Gage
/s/ Patrick M. Meter
/s/ Karen M. Fort Hood